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Petition for Certiorari.

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In The
SUPREME COURT OF THE UNITED STATES

October, 1947, Term.

No. -----

GEORGE M. ILLGES and LOUISE HAMM, Administratrix of the Estate of John Hamm, Deceased,

Petitioners,

vs.

J. E. CONGDON, Jr.,

Respondent.

**Petition for Writ of Certiorari to the Circuit Court
of Walworth County, Wisconsin.**

To the Honorable, the Supreme Court of the United States:

George M. Illges and Louise Hamm, Administratrix of the Estate of John Hamm, Deceased, in support of this, their petition for a writ of certiorari to be directed to the Circuit Court for Walworth County, Wisconsin, to review a decree of judgment entered on the 3rd day of November, 1947, and which became final on the 14th day of November, 1947, pursuant to opinion and mandate of the Supreme Court of the State of Wisconsin filed on the 10th day of June, 1947, respectfully show:

I.

A summary statement of the matter involved.

1.

That in July, 1943, George M. Illges instituted an action at law for damages for breach of contract by service of summons and complaint; that said action was instituted in the Circuit Court for Walworth County, Wisconsin; that thereafter, the defendant, J. E. Congdon, Jr., appeared and on proceedings duly had secured an order interpleading John Hamm as an interpleaded defendant; that said John Hamm appeared and cross-complained against the defendant, J. E. Congdon, Jr., for damages for breach of contract; that the defendant, respondent above named, cross-complained for damages for breach of contract against the interpleaded defendant; that the parties to said action submitted the issues of fact and law to the court without a jury, whereupon the Honorable Arthur W. Kopp, Circuit Judge, was called to hear and determine said case.

2.

That said action proceeded to trial upon the issues of fact made by the testimony and the evidence, after which trial, the trial judge by written opinion decided that the petitioners and the respondent entered into a contract about the 27th day of December, 1941, for the manufacture of timber into lumber pursuant to the terms of which petitioner, Hamm's predecessor in title was to move his sawmill onto the premises and be responsible for the logging, sawing, and piling of the product; petitioner, Illges, was to sell the product, and respondent, Congdon, was to

furnish the timber. From the proceeds of sales were to be paid:

- a. To petitioner, Illges, any expense other than the selling and cost of production;
- b. To respondent, Congdon, fifteen (15) dollars per thousand board feet for timber;
- c. To petitioners, thirty (30) dollars per thousand board feet for converting the timber into lumber products and disposing of the same.

The profits above forty-five (45) dollars per thousand sales' price were to be divided three ways. The contract was to embrace five hundred thousand (500,000) feet log scale of timber and was to be performed within a five (5) year period.

The respondent, Congdon, stopped the enterprise and refused to permit the other parties to perform claiming that they had breached the same by reason of their refusal to permit him to have lumber sawed by the joint enterprise at eighteen (18) dollars per thousand. The trial court determined that the contract did not permit respondent to have lumber at eighteen (18) dollars per thousand, or at any other price from the production of the joint enterprise and that his refusal to permit the other parties to perform the contract constituted a breach thereof. The court further determined that petitioners had done everything within their power to carry out the contract in good faith and that respondent, Congdon, was guilty of a breach.

That after the decision of the trial court, respondent moved for a rehearing, and upon said rehearing a supplemental opinion was filed holding that the offer of petitioners to withdraw from the contract upon certain minimum conditions was not an indication of a desire of petition-

ers to get out of their contract by an offer to compromise the situation and avoid litigation.

Thereafter, the trial court made findings of fact and conclusions of law specifically finding and determining that respondent was not justified in terminating the joint venture; that petitioners had done everything within their power to carry out the contract in good faith; that respondent had no substantial cause for complaint as to the performance by petitioners; that respondent had not been damaged in any manner at the time he stopped work on the contract; that none of the reasons assigned by the respondent in justification of his termination of the contract went to the heart of the contract or constituted a material breach thereof by petitioners; that respondent wrongfully terminated the contract and prohibited further performance when only about one-tenth of the logs agreed upon had been cut.

And as conclusions of law, the trial court specifically determined that respondent wrongfully breached the contract and terminated the joint enterprise; that neither of petitioners breached the contract; that petitioners were entitled to damages in addition to cost of production each in the sum of three thousand nine hundred ninety-three and 66/100 (3,993.66) dollars, amounting in all to the sum of seven thousand nine hundred eighty-seven and 32/100 (7,987.32) dollars as damages.

Judgment upon the findings of fact and conclusions of law was entered on the 20th day of February 1945.

That respondent appealed to the Supreme Court of the State of Wisconsin from the whole of said judgment on the 27th day of March, 1945.

3.

That on said appeal the Supreme Court of the State of Wisconsin by written decision filed on the 4th day of December, 1945, and printed in 248 Wis. Reports 85 found that petitioners had breached the contract entered into by the parties in that they had attempted to enforce a new and different contract and that said attempt on behalf of petitioners was not an inadvertent failure to perform an existing contract but an attempt to enforce the terms of a new contract which had never been agreed upon. By mandate, the Supreme Court directed:

"Judgment reversed and cause remanded for further proceedings in accordance with this opinion, appellant to have full costs."

Thereafter, petitioners moved for a rehearing and upon said rehearing, the Supreme Court by mandate directed:

"The only questions left to be determined are what damages, if any, Congdon suffered by reason of the breach of the contract on the part of Illges and Hamm and the rights of the parties in the remaining assets of the joint enterprise in accordance with the terms of the contract which the court found had been entered into."

4.

Thereafter, said record was remanded to the trial court, and further proceedings thereon duly had. Petitioners duly moved the court for leave to offer additional evidence on the one issue as to whether or not they were attempting to enforce performance of a new and different contract at any time prior to the termination of the contract by respondent; that said motion was denied by the trial court.

That thereupon, the trial court conducted the additional proceedings for the purpose of determining the status and disposition of the timber and lumber on hand up to the date of the hearing, and by written decision, the Supreme Court had by its decision nullified certain findings of fact and concluded that the opposite of each of said findings of fact should have been made.

That, thereafter the trial court made additional findings of fact and conclusions of law dated on the 11th day of September, 1946, by which it determined that the Supreme Court had nullified findings of fact 10, 18, 19, 21, and 22, and had found as follows:

"And the Supreme Court having nullified findings of fact numbers 10, 18, 19, 21, and 22, and having found in effect:

1. In lieu of finding number 10, that the defendant, J. E. Congdon, was justified in terminating the joint venture.
2. In lieu of finding number 18, that the plaintiff and interpleaded defendant have not done everything within their power to carry out the contract in good faith in that they attempted to enforce performance under a new contract not found by the court or entered into by the parties.
3. In lieu of finding number 19 that defendant had substantial cause for complaint as to the performance by the plaintiff and the interpleaded defendant.
4. In lieu of finding number 21 that the attempt of the plaintiff and interpleaded defendant to enforce performance under a contract not agreed upon by the parties went to the heart of the contract and con-

stituted a material breach thereof by the plaintiff and the interpleaded defendant.

5. In lieu of finding number 22, that defendant, J. E. Congdon, did not unreasonably terminate the contract."

That thereafter, judgment was entered in accordance with the mandate of the Supreme Court, and further denying petitioners' right to offer additional evidence.

That thereafter, and on the 12th day of October, 1946, respondent again appealed to the Supreme Court of the State of Wisconsin from the whole of said judgment excepting the portion thereof directing sale of the lumber and material on hand.

4.

That thereafter, and on the 19th day of November, 1946, petitioners instituted mandamus proceedings before the Supreme Court of the State of Wisconsin and secured an order requiring respondent to show cause why an original action should not be instituted in Supreme Court by mandamus for the purpose of construing the construction placed upon the decision and mandate of the Supreme Court filed on the 4th day of December, 1945, and appearing in 248 Wis. 85; that said mandamus was issued, the action authorized, and the court considered the matter on the moving papers, pleadings, and briefs of counsel; that in said proceeding petitioners alleged that notwithstanding the objection of petitioners, the lower court entered judgment on the 5th of October, 1946, denying petitioners' motion for opportunity to offer additional evidence on the one issue as to whether or not petitioners were attempting to enforce performance of a new and different contract at any time prior to the termination of the contract by re-

spondent, Congdon, and further that the Supreme Court of the State of Wisconsin was without power to make findings of fact; that the Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of life, liberty or property without due process of law; that it was the duty of the trial court to construe the mandate of the Supreme Court of December 4, 1945, so as to permit the entry of a valid judgment supported by findings of fact of the trial court; that no trial was had or evidence introduced before the trial court authorizing or permitting a finding that petitioners had at any time attempted to enforce performance under a contract not agreed upon.

That there is no finding by the trial court:

- a. That petitioners sought to enforce a new contract not found by the trial court prior to the termination of the contract by the respondent, Congdon;
- b. That there is no finding by the trial court that petitioners would not proceed under the terms of the contract found by the trial court;
- c. That the trial court *did* find that the petitioners would not proceed under the contract as it was claimed to exist by the defendant, Congdon, and permit the defendant to take lumber from the pile at eighteen (18) dollars per thousand or at any other price, or to furnish the defendant knotty pine;

That as a result of the interpretation by the trial court of the opinion and mandate of the Supreme Court filed on the 4th day of December, 1945, petitioners have had property taken from them without due process of law, and the judgment entered on damages found by the trial court to have been sustained by them as a result of a breach of the contract by the respondent, Congdon.

That by opinion filed on the 25th day of February, 1947, the Supreme Court decided that the trial court had properly construed the mandate and opinion of the Supreme Court as filed on the 4th day of December, 1945, and further decided as follows:

"The relator argues in support of his contention that the judgment entered by the trial court was not in conformity with the mandate, that this court in considering the evidence upon the appeal in the case of Illges vs. Congdon, *supra*, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States for the reason that this court is without power to make findings of fact. This contention cannot be sustained and raises no question either under the Constitution of the State of Wisconsin, or the Constitution of the United States."

5.

That thereafter, by opinion filed in the Supreme Court on the 10th day of June, 1947, on the second appeal taken by respondent to the Supreme Court aforesaid, it determined that the mandate of the Supreme Court in the first appeal filed on December 4, 1945, appearing at 248 Wis. 85 was in error by reason of the fact that respondent terminated the contract and lost any right to sue for damages, and that his sole remedy was restitutionary; that on petitioners' motion for review of said judgment, judgment was modified by requiring respondent to pay sixty-seven and 80/100 (67.80) dollars per thousand for the nine thousand (9,000) feet of lumber taken by him during the time the enterprise was operating in lieu of twenty-one

(21) dollars per thousand fixed by the trial court; that the mandate of the court was:

“The judgment is modified as stated in the opinion and affirmed as so modified.”

6.

That thereafter, after the remand of the record to the trial court, petitioners moved for modifications in the findings of fact and conclusions of law. Respondent likewise moved for modifications of the findings of fact and conclusions of law, and on proceedings thereafter had in the trial court, an order amending and modifying the findings of fact and conclusions of law and judgment was entered by the court after hearings duly had on the 3rd day of November, 1947, and the final judgment was made absolute by order of the court authorizing execution dated and entered November 14, 1947.

7.

That your petitioners respectfully contend that the Supreme Court of the State of Wisconsin is without power to make findings of fact; that the findings of fact of the trial court are sustained by the evidence; that the findings of fact made by the Supreme Court are without support in the evidence; that judgment in favor of the petitioners and against respondent in the trial court was reversed upon findings of fact made by the Supreme Court beyond and in excess of its power; that petitioners have had property rights taken from them without due process of law.

8.

That your petitioner, George M. Illges, is a citizen of the United States of America and of the State of Wisconsin, and resides in the Town of Salem, Kenosha County, Wisconsin; that your petitioner, Louise Hamm, administratrix of the Estate of John Hamm, Deceased, is a citizen of the United States of America and of the State of Wisconsin, and resides in the City of Burlington, Racine County, Wisconsin; that John Hamm, now deceased, during his lifetime was a citizen of the United States of America and of the State of Wisconsin residing in the City of Burlington, Racine County, Wisconsin; that each of the petitioners is entitled to the rights, privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

II.

Statement as to jurisdiction.

The jurisdiction of this court stems from the general power conferred by Judicial Code, Section 237, 28 U. S. C. A. 344, Subsection b. Petitioners have complied with Title 28, Sec. 350 as to applying for the writ within three (3) months from the date when the judgment sought to be reviewed became final. The judgment did not become final until the modifications of the judgment entered on the 7th day of October, 1946, had been completed. On the 2nd day of February, the time for filing petition and supporting briefs was extended to the 4th day of March, 1948, by Mr. Justice Murphy of this court.

III.**Question involved.**

The question is: Does a judgment entered pursuant to mandate of a court of last resort containing findings of fact made by the court of last resort beyond and in excess of its power and not supported by the evidence denying petitioners' damage for breach of contract take property of petitioners without due process of law?

IV.**Reasons relied upon for allowance of
writ of certiorari.**

Petitioners rely upon the following reasons for the allowance of the writ of certiorari in the Supreme Court of the United States:

The findings of fact of the trial court are supported by the clear weight and great preponderance of the evidence.

The finding of the Supreme Court of the State of Wisconsin, to-wit: That petitioners had breached the contract by attempting to force performance by respondent of a contract not agreed upon, is without any support in the record and beyond and in excess of the power of the Supreme Court.

Judgment was entered in the trial court in favor of petitioners for damages for breach of contract in the sum of three thousand nine hundred ninety-three and 66/100 (3,993.66) dollars each, or in the joint amount of seven thousand nine hundred eighty-seven and 32/100 (7,987.32) dollars.

The final judgment denying damages to petitioners is not supported by findings of fact of the trial court and is supported only by findings of fact of the Supreme Court made beyond and in excess of its power.

The Supreme Court of the State of Wisconsin derives its power from Article 7, Sec. 3, Wisconsin Constitution. By Chapter 242 of the Laws of 1893, the legislature of Wisconsin sought to impose upon the Supreme Court the right to give judgment according to the right of cause regardless of the decision upon questions of fact and law made by the trial court. This enactment was declared unconstitutional by the Supreme Court in *Klein vs. Valerius*, 87 Wis. 54. In *Deery vs. McClintock*, 31 Wis. 195, the Supreme Court recognized its own limitation of power and the absence of power in the legislature to add to or detract from the power, and held that the legislature was without power to withdraw appellate jurisdiction and likewise without power to grant to the Supreme Court original power to make findings of fact.

A judgment has accordingly been entered denying petitioners right to a judgment based upon findings of fact in accordance with the findings of fact of the trial court, which denial is based upon findings of fact made by the Supreme Court beyond and in excess of its power, without support in the pleadings or evidence, contrary to undisputed facts, and in violation of settled principles of law.

Therefore, petitioners have had property taken from them without due process of law.

Wherefore, your petitioners pray that a writ of certiorari may issue to the Circuit Court of Walworth County commanding it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be reviewed and determined by this

Honorable Court and for all other relief as may be proper.

Respectfully submitted,

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..... J. Arthur Moran

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Specifications of Errors.

1.

The State Supreme Court erroneously made findings of fact beyond and in excess of its power.

2.

The State Supreme Court erroneously nullified the findings of fact of the trial court supported by ample evidence and substituted in place of the findings of fact findings not supported by any evidence.

3.

That the State Supreme Court erroneously directed the vacation of the judgment in favor of petitioners and against respondent for damages.

4.

That the State Supreme Court erroneously directed the entry of the judgment omitting judgment in favor of petitioners and against respondent for damages for breach of contract.

Summary of Points of Argument.

1.

The Wisconsin Supreme Court is without power to make findings of fact.

2.

The judgment finally entered denying petitioners damages is supported only by findings of fact made by the Supreme Court of Wisconsin and not by any finding of the trial court.

3.

The judgment denies property rights of petitioners in contravention of the Fourteenth Amendment to the Constitution of the United States.

4.

The judgment of the Supreme Court is open to review.

5.

A substantial federal question is presented by the record for review on certiorari.

6.

The judgment here complained of did not become final until the 14th day of November, 1947.

7.

The writ of certiorari should properly be directed to the Circuit Court for Walworth County, Wisconsin, the court possessed of the record.